Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Progeny LMS, LLC	)	File No. 0002049041 et seq.[1]
Waiver Requests for Extension of the	)	
M-LMS Five-year Construction	)	
Requirement		

To: Office of the Secretary
Attn: Chief, Wireless Telecommunications Bureau

Reply to Response ("Progeny Reply") to Opposition[2]
Erratum Version**

Warren Havens ("Havens"), Telesaurus Holdings GB, LLC ("THL"), Telesaurus-VPC, LLC ("TVL"), AMTS Consortium LLC ("ACL"), and Intelligent Transportation & Monitoring Wireless LLC ("ITL")s (together the "Opponents")[3] jointly and severally submit this reply (the "Reply") to Progeny's response (the "Response"—see footnote above) to Opponents' opposition (the "Opposition") to the above-captioned waiver request applications of Progeny LMS, LLC ("Progeny") to

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[1] This is the first file number of these applications, filed 2-15-05, as listed on ULS.

[2] Progeny entitled their responsive pleading a "Reply to Opposition" although per the Settlement, it was to be called a "Response". For purposes here, Opponents refer to Progeny's filing as the "Response".

** There are no changes in substance. Changes consist of: (1) adding a table of contents, (2) corrections of margin alignment and spacing in footnote text, (3) adding page numbers, (4) adding a title for section 7, (5) line-through of two words. (Spelling "typos" not corrected due to Progeny's past objection to simple non-substantial corrections.)

[3] Havens is the majority interest holder and President of THL, TVL, ACL, and ITL.

extend the five-year construction requirement deadline (the "Construction Requirement" and the "Deadline") of all of Progeny's Multilateration Location and Monitoring Service ("M-LMS") licenses (the "Progeny Licenses") (the "Extension Request"). This is submitted pursuant to the settlement agreement regarding FOIA Control No. 2005-449 (an FOIA request submitted by Havens) among Progeny, Havens (for himself and the above noted LLC entities he controls) and the FCC Wireless Telecommunications Bureau (the "Bureau") via email exchange reached on or about November 14, 2005 (the "Settlement").

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1. Summary

The Opposition referenced and incorporated identified past filings by Opponents pertinent to the Request that were also served upon Progeny.

Progeny failed in the Response to refute the facts, arguments and conclusions in the Opposition. For those reasons, as further shown below, the Request should

be denied, the Licenses deemed automatically terminated for failure to meet the now-long-past construction deadline, and the Licenses re-auctioned. If at that time Progeny decides to pursue M-LMS under the existing rules, including bonafide efforts to develop or obtain required equipment, it may do so on an equal footing with other interested parties including Opponents if deemed qualified.

FCC licenses are not a mandate to construct or expend substantial funds and efforts to attempt to obtain or develop equipment to construct, under penalty for failure.[4] They are an option to do so, and upon failure the option automatically terminates at the construction deadline. Progeny stated to the Commission emphatically and repeatedly in the public RM-10403 proceeding (including in *dozens* of ex parte meetings), with no change to this day—and thus also to all potentially capable equipment developers and providers, and end users, and operational partners—that M-LMS was a failure and would continue to fail, and that the only required M-LMS service to meet the construction and service requirement, defined multilateration, was obviated, superceded by GPS and CMRS location services, could not co-exist well with Part 15 use, was not viable, and the like.[5]

Progeny took its Licenses option, placed it solely on its attempt at new rules, and failed.[6] Its Licenses automatically terminated at the construction deadline

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[4] Unless such failure is deemed a disqualification of future licensing for lack of any effort, or for apparent intent at trafficking, or the like.

[5] Progeny also failed to address concerns of Federal priority-rights use under its proposed new rules.

[6] As the Bureau and Progeny know, when the Commission grants a request for rulemaking concerning substantial new rules (such as Progeny requested) or on its

since its Extension Request entirely failed to meet any prong of the waiver standards, and it is otherwise unambiguously not in the public interest, convenience, and necessity under 47 USC 309 to extend license authority to a party who could not more clearly reject the authority— the Commission's intend and requirements of M-LMS expressed in M-LMS rules and rulemaking orders.

2. Bruce Fox/ FRC Extension

Progeny's sole partially valid argument is that the Bureau granted to Bruce Fox, FRC, an extension request and Progeny is similarly situated. Like Progeny, Bruce Fox did no substantial due diligence, if, as Opponents assert based on FCC precedent, that means: substantial expenditure of time and funds to develop and obtain at least *the required* equipment when it is not already available for purchase, and pursuit of this from soon after the licenses were granted until the date of the construction request, with demonstration of continuation until a projected success, and proof of such action by documentation from the parties involved, by some authorized officer, owner, or the like—not unsupported assertions by the licensee that would never stand up in any court or other due process hearing. Both Progeny and FRC merely asserted that they check out the market and found no M-LMS ~~multilateration~~ equipment (there did not even assert that they were

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own motion commences such rulemaking, that in itself may be good cause for an grant of a construction deadline for licenses subject to the potential new rules. Progeny filed its request more than three years prior to its five-year construction deadline. In that time (and to this day) the Commission did not grant the request. Thus, there is no question that Progeny had more than ample time to either succeed in this, or to abandon it in sufficient time, if it had a genuine change of view as to the viability of M-LMS under the rules, to engage in substantial due diligence to meet the construction requirement. It did not do so for reasons noted in the Opposition and this Reply.

looking for multilateration equipment) sitting there for easy purchase. However, while FRC generally supported the Progeny rulemaking request, the FRC support was not in the order of magnitude as Progeny in clear and repeated proclamation of M-LMS service that was obviated and not viable to pursue under existing rules.

In any case, Opponents have pending a petition for reconsideration of the grant of the FRC extension. Opponents do not believe that extension grant will pass muster on appeal.

3. Progeny Failed to Contact the
One Known Equipment Development Source

Progeny cited the Havens M-LMS extension grant. That Havens extension grant, as did the request and its attachments,[7] made clear that Havens had engaged companies to complete certain required M-LMS multilateration equipment and permitted M-LMS communication equipment. Progeny could have contacted Havens at least (see below) upon seeing this request filed, which was in year 2003, to explore joining in Havens' efforts to complete this development. In addition to being able to see this obvious source of equipment development in the Havens extension request, Havens had made substantial efforts to have Progeny (and FRC) enter any sort of reasonable business arrangement whereby they could jointly fund and develop required and useful M-LMS equipment.

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[7] The request referred to another filing then pending by Havens with due diligence materials. The materials were submitted under a request for confidentiality. However, Havens also presented to the FCC staff at a meeting at FCC offices a summary of his extension request which included summary sheets, and these were publicly filed. In addition, a Progeny sought these documents under a valid FOIA request, Havens would have agreed to release redacted copies similar to the procedure he proposed that was ultimately accepted in this proceeding. Thus, summaries of there were available to Progeny immediately, and the rest would have been, with appropriate redaction.

For this purpose, Havens, in the first several years after the first M-LMS auction, met with Progeny's owner, counsel, and other representatives many times at their offices in Indiana and in Washington DC.[8] He had similar meetings with Bruce Fox, sole owner of FRC, and a joint meeting with Fox and Progeny. These attempts by Havens are documented in various writings. As Progeny and its Indiana counsel know, Havens did not oppose the grant to Progeny of the extraordinary waiver required for Progeny to be granted the Licenses after the auction, for the reason that Progeny's owner, Mr. Frenzel and his counsel, Mr. McMains, asserted to Havens that they would actively develop M-LMS. While Havens and Progeny each understood the M-LMS rule that places a spectrum cap on M-LMS ownership at 8 MHz, and thus the need to compete in deliver of services in the marketplace, cooperation to develop equipment was reasonable and permissible under FCC and other law. After multiple attempt by Havens, neither Progeny nor FRC would agree to undertake any joint efforts with Havens at development of needed and useful M-LMS equipment.

As Havens indicated in his petition for reconsideration of the FRC extension grant, he is not under an obligation to give away for no consideration the proprietary information and rights secured in his M-LMS equipment development. He does not of course claim that Progeny or FRC must join him in his M-LMS equipment development undertakings. However, had either Progeny or FRC been willing to share costs, or enter a commercially reasonable arrangement, he would

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8 This entire filing is under a declaration under penalty of perjury.

have given it consideration and probably accepted it—that was his proposal to each of them.

This, by itself, makes clear that neither Progeny nor FRC actually sought M-LMS equipment, since the one known party who was developing it was not even approached.

4. Progeny Asserted Due Diligence Materials

For reasons noted above and in the Opposition, such materials failed to demonstrate that Progeny undertook any due diligence at all. Evidence in a due process relief proceeding is not bald assertions by the beneficiary of the sought relief, but by third parties. If indeed, as Progeny initially baldly asserted (in the Extension Request) it understood substantial due diligence to obtain the required equipment, it would have obtained and presented specifics, including key documents from the parties with whom such undertakings had been pursued. Clearly, all Progeny did, if anything, was make some calls, a sort of "survey" as Progeny writes. It gives no evidence even of such a survey. This is not due diligence.

It is not credible to even assert that a survey would ever result in any luck. As Progeny admits in its Response, equipment companies were not interested in equipment based on current rules and Part 15 use under such rules. Thus, no such company would ever make the equipment, and thus, there was no reason to survey a few times, as Progeny asserted.

Progeny had to spend money and make long term commitments to compel a company to develop then make and supply required M-LMS equipment and any

additional permitted equipment. Its due diligence materials show that it entirely failed to so this.

5. Precedents Do Not Support Grant

See Exhibit 1 hereto, whose text is incorporated herein. Progeny failed to address these precedents. These precedents require denial of the Extension Request.

Moreover, the Opposition was correct that under all precedents cited (which included those in Exhibit 1, which were in the main documents referenced and incorporated in the Opposition as its main argument), the Progeny Extension Request fails, including since it is uniquely extreme case where the requesting licensee has rejected the service which it seeks an extension to construct.

If the Bureau grants the request, the precedent would entirely gut the meaning of a waiver request—any such request for any reason would have to be granted.

6. Progeny Part 15 Claims Are Insufficient and Inaccurate And Against Clear Public Interest

In its Response, Progeny again assets as it has in RM-10403 and in the Extension Request that Part 15 use of the band causes difficulty. Of course it does: that was as clear as possible in the nature of M-LMS, in all M-LMS rulemaking and in its rules. This is not an exclusive band. Progeny bought the licenses with this condition, and with there being no equipment ready to buy.

However, it clear that Part 15 equipment can co-exist with other Part 15 equipment in the same band. The FCC Spectrum Task Force report and numerous other proceedings (on Part 15, cognitive radio, TV spectrum white space for 802.22

unlicensed equipment, etc.) all make clear that licensed and unlicensed services and equipment not only can coexist, but this is a highly important that this goal be pursued. M-LMS is band in which the FCC set this as a goal long ago. Equipment being developed internationally for WiMax (the 802.16 family of standards) operates both in licensed and unlicensed bands, another example that advanced communications can work well in bands with multiple authorized users in an area (which is the fundamental nature of unlicensed service).

Thus, this assertion by Progeny fails. Yes, licensed equipment in band where unlicensed equipment is allowed has challenges. But this was a task M-LMS licensees all bought into by buying the licenses, and it is feasible to accomplish with reasonable due diligence (actual expenditure of substantial money and expertise).

7. Even Threshold of Due Diligence Absent

Progeny did not assert in its alleged due diligence materials that it had any contract with any equipment development or equipment provider entity, not even a nondisclosure or confidentiality agreement. Havens, and his advisors, including two the leading wireless engineers in 3G technology, have discussed M-LMS equipment with virtually all providers of multilateration equipment and 3G wide-area mobile communications equipment. No such communication becomes serious without entering a mutual nondisclosure agreement, since each side had proprietary information that must be disclosed to seriously consider a contractual relation to develop or co-develop such equipment. Not once, in hundreds of communications with such companies, has any of them mentioned being contacted, surveyed, or otherwise dealing with Progeny.

8. Additional Facts and Arguments

Progeny did not directly address McCart and Hilltop Orders that were incorporated and referenced by Havens in the Opposition at page 5 and Attachment 2, #2.. Progeny did not reference and incorporate its previous opposition filings that attempted to refute these orders, so Progeny in the instant proceeding has not refuted applicability of McCart and Hilltop Orders. See Exhibit 1 below for the arguments raised by Opponents. McCart and Hilltop dealt with companies that, despite there being no equipment available, had done nothing to pursue equipment development on their own and thus were found not to have met the requirements for grant of an extension. Progeny's extension request is likewise completely "open-ended" and thus must be denied.

Contrary to the Response, Progeny has not shown they have conducted extensive and ongoing due diligence. In fact, Progeny's due diligence is entirely based upon Progeny's own assertions— (i) its "survey" and "periodic reviews" (Response ~~Reply~~ at page 11) appear to have only consisted of reviewing manufacturers websites for equipment in 902-928MHz, which could have been done in an afternoon, and Progeny doesn't even state when the survey or periodic reviews actually occurred, (ii) it contains no declaration or affidavit under penalty of perjury from an officer of Progeny, (iii) it provides no actual proof of communications with vendors, manufacturers or end users, including any letters, emails, contracts, understandings, or other substantial communications with such entities, (iv) it does not specify the person(s) who conducted the alleged due diligence or identify specific person(s) contacted at vendors or manufacturers, or give the date or period of time

when any communications occurred and (v) it does not provide any evidence of any in-person meetings with equipment manufacturers or possible end-users. In addition, it gives no details of the type of equipment it may be pursuing for any location-based service and does not state with which manufacturers it has or is currently discussing development of such a product, despite the fact that at this late date Progeny realistically should already have some agreement(s) in place to develop multilateration equipment because, even if the extension were granted, it would need the equipment rather soon to meets its construction obligations. Also, Progeny does not describe the nature or frequency of their communications with any vendors, manufacturers, end users or other entities in its due diligence. Without disclosing more information, there is no way to know what communication took place, if any, and whether or not it entailed anything more than calling a general number and speaking with an operator or hanging up.

Progeny never approached or called Havens about equipment for M-LMS, even though Havens had stated publicly that he was working on development of multilateration equipment for LMS. Havens asked Progeny, and FCR, if they wanted to cooperate in such a development, but neither chose to do so.

Manufacturers are not going to just make equipment on their own for the LMS service without a licensee making a business and technical case. Progeny's due diligence and its Response contained no business or technical plans that had been provided to vendors. These would have been critical elements of any real due diligence to obtain M-LMS equipment. This fact makes the survey disingenuous because no equipment manufacturer is going to suddenly just happen to make

equipment for the band, especially given the claims by Progeny in its rulemaking that multilateration has been obviated.

Progeny says manufacturers are reluctant to develop equipment for M-LMS, but then fails to show how it will convince these reluctant manufacturers to make multilateration equipment that it will supposedly provide to end users, including for alleged homeland security purposes.

Despite the Response assertions, Progeny provides no evidence of any agreements or communications with any critical infrastructure entities showing their interest in using the Progeny spectrum or, more importantly, stating what equipment is proposed to be used. There is no point in discussing with an end user use of the spectrum if Progeny is not proposing to them the equipment to be used or plans to develop any equipment.

Response failed to refute the Opposition in that Progeny did not pay or give any consideration to any company to develop equipment. The Response ~~Reply~~ is ~~moot~~ mute on this point and provides no evidence to show otherwise, such as a contract or invoice.

Response relies on Havens and FCR precedents, but Havens has already shown why the Havens Order does not apply to Progeny and why the FCR grant was in error. Also, the FCR grant is under reconsideration.

Response ~~Reply~~ failed to provide any signed agreements or refer to any actual signed agreements or understandings to develop equipment.

Contrary to the Response at page 11, Progeny has failed to prove or show details of its "numerous efforts to develop markets, technology and applications,

including a comprehensive survey and period reviews of relevant vendors". In fact, Progeny's due diligence completely fails to support this claim because it contains no evidence and is based solely upon Progeny's own assertions. The Progeny due diligence is devoid of any material evidence, including any contracts, agreements, communications, letters, offers, etc. Thus, the Commission cannot conclude anything from it.

The Response had an opportunity to submit actual proof of real due diligence but did not; therefore, it must be assumed that Progeny does not have any documentation other than its own assertions. At most the due diligence witnesses that Progeny made some phone calls and looked at some websites, but these could have been done in a day or two at any point in time.

Respectfully submitted,

[Submitted Electronically. Signature on File]

Warren C. Havens, Individually and as President of
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December 13, 2005

Exhibit 1

The below "McCart and Hilltop Orders" section is cut from the "Request Under Section 1.41 To Place on Public Notice or Alternative Action" (see pgs. 11-12) filed by Warren Havens via email on 5/2/05 with the Commission's Secretary at wtbsecretary@fcc.gov (Cc: to Thomas Derenge with the FCC and Progeny counsel), regarding File No. 0002049041 et seq. 19 pages. This "Request" was fully incorporated in Opponents' Opposition at page 5 and Attacment 2, #2.

McCart and Hilltop Orders

The Progeny Extension request should not be granted based on applicable precedents, in addition to the fact, noted herein, that grant would be futile. As noted in footnote 4 above, Petitioners are not, in this Request, submitting a petition to deny, except as the last alternative request, and thus are not here presenting applicable precedents after the addition research they note above they would undertake for such purpose. However, the following is presented. The McCart Order[9] and Hilltop Order[10] (the .Orders.) apply.

The Commission found in McCart at par. 6:

> McCart argues principally that it could not meet its construction deadline set forth in Section 90.665(c) because of the lack of digital technology for deployment in 900 MHz systems. However, we find this reason alone, and McCart.s economic arguments, for that matter,

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[9] In the Matter of Request for Extension of Time to Construct a 900 MHz Specialized Mobile Radio Station and Request for Waiver of the Automatic License Cancellation of Call Sign KNNY348, Order, 19 FCC Rcd 2209 (WTB, MD 2004) (McCart Order).

[10] In the Matter of Request for Extension of Time to Construct an Industrial/Business Radio Service Trunked Station Call Sign WPNZ964, Memorandum Opinion and Order, 18 FCC Rcd 22055 (WTB, CWD 2003) (Hilltop Order).

> are insufficient to allow McCart to hold the spectrum until equipment finally becomes available. Significantly, McCart.s request is completely open-ended and provides no information as to how long it may take for equipment to become available for its particular system. Without some idea of when equipment will become available, we cannot even be sure that grant of a limited waiver in this case will provide relief to McCart.

The Commission found in Hilltop at par. 8:

> Hilltop argues that it could not comply with the Section 90.155(a) because no mobile equipment was available that complied with a condition placed on this license. We find this reason alone, however, is insufficient to allow Hilltop to hold the spectrum until equipment finally becomes available. Significantly, Hilltop provides no information as to how long it may take for equipment to become available. Without some idea of when equipment will become available, we cannot even be sure that grant of a limited waiver in this case will provide relief to Hilltop. Finally, we disagree with Hilltop.s assertion that it is similarly situated to FCI 900, Inc. and Neoworld. FCI 900 Inc. and Neoworld were granted relief in order to allow time for digital equipment to become available. Unlike Hilltop.s situation, FCI 900, Inc. provided assurances from an equipment manufacturer that digital equipment would be available shortly, even though only analog (but not digital) equipment was available at that time. In contrast, Hilltop provides no plan for obtaining equipment and no certainty of when, if ever, equipment will be available to meet their needs.

Similarly, Progeny.s Extension Request is completely open-ended and provides no evidence that it is or will be pursuing any equipment development to satisfy the applicable construction rule, Section 90.155(d) and (e). Rather, as noted herein, Progeny asserts that the required Multilateration is obviated and the like, and will fail in the marketplace, and thus it seek other unidentified equipment and service. The Extension Request fails under these reasonable precedents, as well as the general waiver standard in Section 1.925.

Declaration

I, Warren C. Havens, hereby declare under penalty of perjury that the foregoing *Reply* including all Attachments and referenced incorporated documents were prepared pursuant to my direction and control and that all the factual statements and representations contained herein attributed to my knowledge, as the text or context makes clear, are true and correct.

[Submitted Electronically. Signature on File.]

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Warren C. Havens

Date: 13 December 2005

Certificate of Service

I, Warren Havens, hereby certify that I have, on this day, December 13, 2005, placed into the USPS mail system, unless otherwise noted, a copy of the foregoing *Reply to Response to Opposition to Progeny Extension Waiver Request*, with First-class postage prepaid affixed, to the following:

Office of the Secretary
Federal Communications Commission
445 12th St., SW, Room TW-B204
Washington, D.C. 20554
(Via email only to WTBSecretary@fcc.gov pursuant to Order, FCC 01-345)

Richard Arsenault
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445 12th St., SW, Room 4-B408
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Progeny LMS, LLC
Janice Obuchowski
Halprin Temple
1317 F Street NW
Washington, DC 20004
(Also via email to JO@ftidc.com)

[Filed electronically. Signature on file.]

_____
Warren Havens

The above is in accord with the settlement agreement regarding Opponents' FOIA request in this matter, which provides:

Filing of the comment cycle pleadings would be by e-mail under the procedures
 set forth in FCC 01-345* (e-mail to wtbsecretary@fcc.gov) with a cc copy to
 Mr. Richard Arsenault at Richard.Arsenault@fcc.gov and to the other party
 (as noted below). Parties would serve each other on the date of the filing by providing
 a copy by US mail or private courier. The Certificates of Service would reflect the
 process described above. E-mailed copies to Progeny would be sent to Ms. Janice
 Obuchowski at JO@ftidc.com , and e-mail copies to Mr. Havens would be sent to
 Counsel to Mr. Havens, Ari Fitzgerald, at AQFitzgerald@hhlaw.com , with copies to
 Mr. Havens at wchavens@aol.com and jstobaugh@telesaurus.com . In addition,

- on the same day as they are transmitted to the recipient, an electronic copy of the
- Progeny withdrawal request and Wireless Bureau acceptance, as noted above, would
- be transmitted by e-mail to Mr. Havens at the three e-mail addresses provided above.